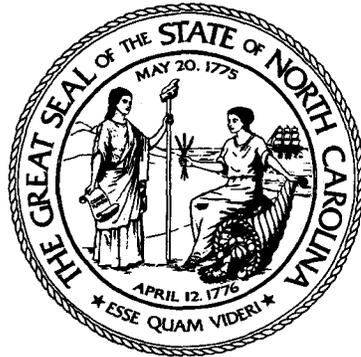


LEGISLATIVE RESEARCH COMMISSION

Telephone Solicitation Committee



REPORT TO THE
2000 SESSION OF THE
1999 GENERAL ASSEMBLY
OF NORTH CAROLINA

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STATE OF NORTH CAROLINA
LEGISLATIVE RESEARCH COMMISSION
STATE LEGISLATIVE BUILDING
RALEIGH, NC 27601



May 4, 2000

TO THE MEMBERS OF THE 1999 GENERAL ASSEMBLY (REGULAR SESSION 2000):

The Legislative Research Commission herewith submits to you for your consideration its 2000 final report on telephone solicitation. The report was prepared by the Legislative Research Commission's Committee on Telephone Solicitation pursuant to G.S. 120-30.17(1).

Respectfully submitted,

Handwritten signature of James B. Black in cursive script.

James B. Black
Speaker of the House

Handwritten signature of Marc Basnight in cursive script.

Marc Basnight
President Pro Tempore

Cochairs
Legislative Research Commission



1999 - 2000

LEGISLATIVE RESEARCH COMMISSION

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PREFACE

The Legislative Research Commission, established by Article 6B of Chapter 120 of the General Statutes, is the general purpose study group in the Legislative Branch of State Government. The Commission is cochaired by the Speaker of the House and the President Pro Tempore of the Senate and has five additional members appointed from each house of the General Assembly. Among the Commission's duties is that of making or causing to be made, upon the direction of the General Assembly, "such studies of and investigations into governmental agencies and institutions and matters of public policy as will aid the General Assembly in performing its duties in the most efficient and effective manner" (G.S. 120-30.17(1)).

The Legislative Research Commission, prompted by actions during the 1998 Session and 1999 Sessions, has undertaken studies of numerous subjects. These studies were grouped into broad categories and each member of the Commission was given responsibility for one category of study. The Cochairs of the Legislative Research Commission, under the authority of G.S. 120-30.10(b) and (c), appointed committees consisting of members of the General Assembly and the public to conduct the studies. Cochairs, one from each house of the General Assembly, were designated for each committee.

The study of telephone solicitation was authorized by Section 2.1 (8)(b) of Chapter 395 of the 1999 Session Laws (Regular Session, 1999). Part II of Chapter 395 allows for studies authorized by that Part for the Legislative Research Commission to consider HB Bill 1080 in determining the nature, scope and aspects of the study. HB 1080 is entitled "AN ACT TO ALLOW CONSUMERS TO BE PLACED ON A LIST OF RESIDENTIAL TELEPHONE SUBSCRIBERS WHO OBJECT TO TELEPHONE SOLICITATIONS AND PROHIBITING TELEPHONE SOLICITORS FROM MAKING CALLS TO PERSONS ON THAT LIST". Section 1 of HB Bill 1080 reads in part: "The rights to privacy and commercial speech can be balanced in a way that accommodates both the privacy of individuals and legitimate telemarketing practices". SB 2221 was also introduced during the 1999 Regular Session to

accomplish a similar purpose. The relevant portions of Chapter 395, HB Bill 1080, and SB 221 are included in Appendix A.

The Legislative Research Commission authorized this study under authority of G.S. 120-30.17(1) and grouped this study in its Government Regulatory Issues area under the direction of Representative Wood. The Committee was chaired by Senator Weinstein and Representative Allen. The full membership of the Committee is listed in Appendix D of this report. A committee notebook containing the committee minutes and all information presented to the committee will be filed in the Legislative Library by the end of the 1999-2000 biennium.

Committee Proceedings

Meeting on March 1, 2000

The Committee on Telephone Solicitation held its first meeting on Wednesday, March 1, 2000. Ms. Esther Manheimer, Committee Counsel, explained House Bill 1080, introduced during the 1999 Regular Session by Representative Allen. HB 1080 would require the Secretary of State to establish a list of residential telephone subscribers who do not wish to receive telephone solicitations. The bill authorizes the Attorney General to investigate violations of the provisions of the bill, which would prohibit solicitors from calling subscribers to the list, from failing to identify themselves, and from blocking caller ID. The Attorney General could impose civil penalties of not more than \$500 for each violation and may seek equitable relief to restrain further violations.

Ms. Manheimer explained that the bill contains some problematic provisions. An allowance for solicitors to demonstrate that they had implemented reasonable procedures to avoid violations shows up in conflicting provisions, one making such a showing an affirmative defense and the other establishing it as simply a factor to be considered by the court in determining the amount of the civil penalty. Also, the bill provides that solicitors participating in the Telephone Preference Service of the Direct Marketing Association (DMA) are deemed to be in compliance with the act. The DMA is a private entity that compiles its own "do not call list" for its members.

Ms. Manheimer concluded by observing that the bill appears to be a constitutionally-permissible method of balancing the first amendment rights of telephone solicitors engaging in commercial speech with the governmental interest of protecting citizens' privacy within their own homes. However, there is some question as to whether a state has jurisdiction over

interstate calls or calls originating from out-of-state. HB 1080 extends the State's jurisdiction over entities "doing business in this State" and does not directly address the issue of "interstate" calls. The jurisdiction issue might ultimately have to be litigated by the Attorney General.

The next speaker was Philip A. Telfer, Special Deputy Attorney General. He began by expressing the Attorney General's support for individuals' rights to control telephone calls to their own homes. However, he felt that the General Assembly should be careful to ensure that legislation aimed at addressing these privacy rights was meaningful and workable. He observed that an exception in the bill that prevents consumers from stopping calls by persons with whom they have a "prior or existing business relationship" is overly broad and should be further limited. He was also concerned about the alternative compliance provision for participation in the DMA's Telephone Preference Service.

Mr. Telfer also urged the Committee to carefully consider the enforcement provisions in the bill. He noted the need to fix the conflicting provisions that Committee counsel had pointed out, and suggested that the bill might provide for a private right of action by consumers who have been subjected to violations of the act. He concluded that since it would be unrealistic to expect the Attorney General to be able to prosecute all violations, it would be a good idea to empower citizens to pursue their own rights in court.

Ms. Sheila Pope, General Counsel to the Secretary of State, was the next speaker. She told the Committee that the Secretary of State had reviewed the bill from an administrative standpoint. Their primary concern was whether the Secretary of State has the personnel or technological structure to administer the proposed program in an appropriate and efficient way.

She noted that her office had investigated a means of automating registration by means of an integrated computer telephone system that would allow citizens to register by the internet and over the telephone. Funding would be needed for this, as well as for publicizing and educating

the public about the availability of the program. The estimated start-up cost was \$400,000, but Ms. Pope suggested that those funds could be paid back to the State as fees were collected from consumers who signed up for the list and solicitors paid for access to the list.

The Committee next recognized Mr. Wade Hargrove, representing the Direct Marketing Association. Mr. Hargrove noted the importance of direct marketing in providing citizens with access to goods and services. He told the Committee that the industry represents \$36.4 million in sales in North Carolina and employs over 600,000 citizens.

Mr. Hargrove explained to the Committee that the DMA has instituted a Telephone Preference Service through which consumers may have themselves placed on a "do not call" list. There is no charge for placement on the list, but only a small percentage of consumers ever take advantage of the service.

Mr. Hargrove expressed the opinion that the benefits of the proposed legislation did not justify the cost to taxpayers and suggested that there were less expensive and less intrusive ways of achieving the goal. He suggested that rather than use State funds to set up a new program in State government, those funds might be used to make the public aware of the current means of getting one's name removed from telephone solicitation lists.

Mr. Hargrove also contended that there are legal impediments to adopting a State law intended to regulate calls originating outside the State of North Carolina. He stated that states may not regulate interstate commerce, and that therefore he believed that a state law similar to HB 1080 could only reach calls that originate and terminate within the state's borders. He also noted that it might be difficult to assert jurisdiction over telemarketers located in another state.

Mr. Hargrove noted the existence of two separate federal laws regulated by the Federal Communications Commission and the Federal Trade Commission that, respectively, require solicitors to maintain "do not call" lists and prohibit them from calling persons who have asked

to be placed on those lists. He suggested that the problem HB 1080 was designed to alleviate might be best addressed by better informing the public of its rights under the existing federal law and by educating consumers about the DMA's Telephone Preference Service. He also noted that it might be worthwhile to consider a state law that tracked the federal laws requiring solicitors to maintain "do not call" lists, since he felt it was unclear whether the federal laws apply to intrastate calls. (A summary of the federal laws and the Telephone Preference Service is contained in Appendix C).

The next speaker was Mr. Richard Carlton, representing the Securities Industry Association. Mr. Carlton thought it was just as important to consider the rights of those consumers who do want to receive telephone solicitations as those of the citizens who do not. He also thought it was important to maintain consistency with the federal scheme for regulating telephone solicitation.

Mr. John Policastro, representing AT&T, was the next speaker. He also believed that the federal approach was the appropriate one, and noted that AT&T cooperated with the DMA in the maintenance and use of its industry-wide list.

Next, Mr. Sean Dail, Committee Counsel, reviewed the regulation of telephone solicitation in other states. He noted that North Carolina already has laws that address abuse and deception over the telephone and that are aimed at preventing fraudulent telemarketing. However, the State does not currently have legislation that prohibits or regulates the making of telephone solicitation calls in an effort to address privacy issues.

Mr. Dail reviewed the federal laws, and then observed that several states, such as Georgia, have passed state laws similar to HB 1080 that allow consumers to elect to be placed on state-maintained "do not call" lists and impose penalties on telemarketers who call them against their wishes. The cost of maintaining these lists comes from fees charged to consumers for

inclusion on the lists, from fees charged to solicitors for access to the lists, or from a combination of the two. Other states have more closely followed the federal model by requiring each telemarketer to maintain its own list and giving consumers the right to request placement on that list.

Many states also restrict the hours within which telephone solicitations may be made (as does the federal law, which restricts calls to between the hours of 8 a.m. and 9 p.m.). Finally, New Jersey is one of several states that statutorily require every telephone company providing service in that state to enclose at least annually a notice informing its customers of the methods for having their names removed from solicitation lists. The New Jersey statute also requires that information to be printed in a prominent place in every telephone directory.

Meeting on March 23, 2000

At its second meeting, the Committee first heard from Ms. Susan Stewart, a resident of Greensboro who related her experiences in trying to reduce the number of telemarketing calls to her home. She had maintained a file documenting these efforts for more than two years, but stated that she was very dissatisfied with the results. In 1998, she began telling telemarketers that she did not accept telephone solicitations and asked to be removed from their calling lists. After reading that consumers should contact the FCC about callers who did not abide by their "do-not-call" requests, she began to try and keep records of the calls. However, she discovered that telemarketers would often not provide her with the information necessary to identify the entity responsible for the call.

On the advice of her telephone company, she wrote to the DMA's Telephone Preference Service requesting inclusion on its do-not-call list, and also contacted the FCC, all her credit card companies, the ITC Marketing Group, and her credit bureau. This effort resulted in a noticeable

reduction in solicitations by early 1999, and she remained relatively free from unwanted calls for six to eight months. But the frequency of calls soon increased, and she had recently contacted the FCC for a second time and sent a second written request to the Telephone Preference Service.

Ms. Stewart expressed the hope that the Committee would pursue legislation that would make telemarketers accountable for their behavior. She felt strongly that telephone customers should be able to choose permanent or at least long-lasting "do-not-call" status.

Next, Ms. Esther Manheimer, Committee Counsel, reviewed Senate Bill 221, a second bill introduced during the 1999 Regular Session to address the issue of telephone solicitation. Both SB 221 and HB 1080 have the same basic structure, but differ in several important respects. SB 221 would require the Attorney General, rather than the Secretary of State, to maintain a "do not call" list. SB 221 also provides for a private right of action by persons receiving more than one solicitation within a twelve-month period from the same solicitor in violation of the act; this private right would allow them to sue to enjoin the solicitor and collect up to \$2,000 in damages. Another significant difference is that SB 221 does not allow for alternative compliance for solicitors through participation in the Direct Marketing Association.

At this point in the meeting, Representative Allen was recognized to propose a new approach to the issue before the Committee. He explained that he had asked the staff to prepare a draft bill that would provide a state version of the existing federal legislation, requiring each telephone solicitor to remove residential subscribers from their contact lists when those subscribers request to be removed, as opposed to the compiling of a single, state-maintained list. The new approach would also include an effort to notify consumers about the methods for reducing telephone solicitations to their homes.

Representative Allen recognized Ms. Esther Manheimer to present the new draft to the Committee. The proposed legislation would prohibit solicitors doing business in North Carolina from calling any telephone number for which the subscriber has requested to be removed from the solicitor's contact list. The bill would also require solicitors to identify themselves and the entity responsible for the call; require solicitors to ask the person called if he or she consented to the solicitation; require solicitors to establish procedures to prevent further calls to those persons requesting not to be called; restrict calling to the hours between 8 am and 9 pm; and prohibit solicitors from blocking access to caller ID.

The proposed bill would authorize the Attorney General to investigate violations, impose a civil penalty for violations, and seek equitable relief to restrain further violations. The bill would also grant citizens with a private right of action to recover damages for violations of the act.

In addition, the new draft includes language making it clear that North Carolina recognizes the private right of action provided under federal law to consumers whose "do not call" requests have been violated. At least some potential actions have reportedly been disallowed in this State because there is currently no State law that specifically permits these actions.

Finally, the proposed bill would direct the Utilities Commission to require telephone companies to notify their residential customers of the provisions of the new state law, of the federal laws allowing consumers to object to receiving telephone solicitations, and of programs like the Direct Marketing Associations' Telephone Preference Service. This would be accomplished by enclosing that information, at least once a year, in telephone bills. The Utilities Commission is also charged with ensuring that this information is published in a clear and conspicuous manner in the consumer information pages of every phone directory.

Mr. Wade Hargrove, representing the Direct Marketing Association, was recognized, and expressed the opinion that the new draft was a more appropriate response to the issue than the other bills that the Committee had been considering. He did not find it to be overreaching like the other bills, and it would not involve the significant expense to the State that the other bills did.

Senator Robinson questioned the amount of the penalties provided for in the new bill; the maximum recovery per violation by both the Attorney General and by private citizens was set at \$500. Senator Allran questioned whether the language requiring solicitors to identify themselves was as clear and as strong as it needed to be.

Mr. Philip Telfer, Special Deputy Attorney General, was recognized, and noted that the new draft was an incremental first step toward giving consumers some rights they do not presently have. But he also questioned whether the maximum penalties in the bill were set high enough, and had some suggestions for providing some consistency with existing consumer protection legislation.

Representative Weiss asked whether it might be appropriate to make some provision for allowing attorney fees to plaintiffs who sue successfully under the private right of action provided in the new draft.

The Chairs directed Committee Counsel to work with the Attorney General's office to address the concerns expressed by the Committee and to prepare a revised draft for the Committee to consider at its next meeting.

Meeting on April 13, 2000

At its final meeting, the Committee approved a revised version of the draft legislation discussed during the March 23 meeting and approved the contents of this report. The revisions include a new section incorporating (1) legislative findings that were contained in both House Bill 1080 and Senate Bill 221; (2) new language clarifying the requirement that a solicitor provide identification when calling residential telephone subscribers; (3) revised language tying the Attorney General's enforcement authority to the existing statutory language authorizing enforcement of consumer protection laws; and (4) new language allowing for the recovery of attorney fees.

Mr. Wade Hargrove, representing the Direct Marketing Association, requested that the Committee consider an amendment that would allow persons making calls on behalf of telephone solicitors to use fictitious names so long as each fictitious name was traceable to only one specific employee of the telephone solicitor. The Committee deferred making such a revision to the bill, but the Cochairs promised to consider the proposal in handling the bills after introduction.

A copy of the draft and a bill analysis are contained in Appendix B.

FINDINGS

The Committee on Telephone Solicitation finds that the public interest requires the establishment of a mechanism under which the citizens of North Carolina can decide whether or not they wish to receive telemarketing calls in their homes. The Committee further finds that the rights to privacy and to commercial speech can be balanced in a way that accommodates both the privacy of individuals and legitimate telemarketing practices.

RECOMMENDATIONS

The Committee on Telephone Solicitation recommends that the General Assembly enact the bill found in Appendix B, which would (1) require telephone solicitors doing business in this State to identify themselves when they call, and inquire at the beginning of the call whether the person called consents to the solicitation; (2) require telephone solicitors doing business in this State to remove residential telephone subscribers from their contact lists when those subscribers request to be removed; (3) limit telephone solicitations in this State to the hours of 8 a.m. to 9 p.m.; (4) prohibit telephone solicitors from blocking the transmission of Caller ID; and (5) direct the Utilities Commission to require local carriers to notify their residential subscribers of this new State law, of the federal laws pertaining to telephone solicitation, and of private industry programs allowing consumers to be placed on "do not call" lists. The notification would be placed at least once a year in all telephone bills sent to residential subscribers and conspicuously published in all telephone books.

The proposed legislation is found in Appendix B and is followed by an explanation.

APPENDIX A

CHAPTER 395
1999 Session Laws (1999 Session)

AN ACT TO AUTHORIZE STUDIES BY THE LEGISLATIVE RESEARCH COMMISSION, TO CREATE VARIOUS STUDY COMMISSIONS, TO DIRECT STATE AGENCIES AND LEGISLATIVE OVERSIGHT COMMITTEES AND COMMISSIONS TO STUDY SPECIFIED ISSUES, AND TO AMEND OTHER LAWS.

The General Assembly of North Carolina enacts:

PART I.-----TITLE

Section 1. This act shall be known as "The Studies Act of 1999".

PART II.-----LEGISLATIVE RESEARCH COMMISSION

Section 2.1. The Legislative Research Commission may study the topics listed below. When applicable, the bill or resolution that originally proposed the issue or study and the name of the sponsor is listed. Unless otherwise specified, the listed bill or resolution refers to the measure introduced in the 1999 Regular Session of the 1999 General Assembly. The Commission may consider the original bill or resolution in determining the nature, scope, and aspects of the study. The following groupings are for reference only:

...
(8) Government Regulatory Issues:

...
b. Telephone solicitation (H.B. 1080 - Allen).

...
Section 2.2. Committee Membership. -- For each Legislative Research Commission committee created during the 1999-2001 biennium, the cochairs of the Legislative Research Commission shall appoint the committee membership.

Section 2.3. Reporting Date. -- For each of the topics the Legislative Research Commission decides to study under this Part or pursuant to G.S. 120-30.17(1), the Commission may report its findings, together with any recommended legislation, to the 1999 General Assembly, 2000 Regular Session, or the 2001 General Assembly.

Section 2.4. Funding. -- From the funds available to the General Assembly, the Legislative Services Commission may allocate additional monies to fund the work of the Legislative Research Commission.

...
PART XXIII.-----EFFECTIVE DATE AND APPLICABILITY

Section 23.1. Except as otherwise specifically provided, this act becomes effective July 1, 1999. If a study is authorized both in this act and the Current Operations Appropriations Act of 1999, the study shall be implemented in accordance with the Current Operations Appropriations Act of 1999 as ratified.

In the General Assembly read three times and ratified this the 21st day of July, 1999.

s/ Dennis A. Wicker
President of the Senate

s/ James B. Black
Speaker of the House of Representatives

s/ James B. Hunt, Jr.
Governor

Approved 9:03 p.m. this 5th day of August, 1999

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 1999

H

2

HOUSE BILL 1080*
Corrected Copy 4/19/99

Short Title: Telephone Solicitation.

(Public)

Sponsors: Representatives Allen; Alexander, Baddour, Cansler, Crawford, Dedmon, Fox, Gardner, Hackney, Hill, Hurley, Kinney, Thompson, Tolson, and Warner.

Referred to: Public Utilities, if favorable, Finance.

April 15, 1999

- 1 A BILL TO BE ENTITLED
2 AN ACT TO ALLOW CONSUMERS TO BE PLACED ON A LIST OF
3 RESIDENTIAL TELEPHONE SUBSCRIBERS WHO OBJECT TO
4 TELEPHONE SOLICITATIONS AND PROHIBITING TELEPHONE
5 SOLICITORS FROM MAKING CALLS TO PERSONS ON THAT LIST.
6 The General Assembly of North Carolina enacts:
7 Section 1. The General Assembly finds that:
8 (1) The use of the telephone to market goods and services to
9 consumers is increasingly pervasive now due to the availability of
10 cost-effective telemarketing techniques;
11 (2) Thousands of businesses actively telemarket goods and services to
12 business and residential customers;
13 (3) Some citizens of this State are concerned at the proliferation of
14 calls to their homes from telemarketers;
15 (4) The rights to privacy and commercial speech can be balanced in a
16 way that accomodates both the privacy of individuals and
17 legitimate telemarketing practices; and
18 (5) The public interest requires the establishment of a mechanism
19 under which the citizens of this State can decide whether or not
20 they wish to receive telemarketing calls in their homes.

1 Section 2. Chapter 75 of the General Statutes is amended by adding a
2 new section to read:

3 "§ 75-30.1. Restrictions on telephone solicitations.

4 (a) For purposes of this section:

5 (1) "Residential telephone subscriber" means a person who subscribes
6 to residential telephone service from a local exchange company
7 and uses that service primarily for residential purposes, or the
8 persons living or residing with that person.

9 (2) "Telephone solicitation" means a voice communication over a
10 telephone line for the purpose of soliciting or encouraging the
11 purchase or rental of, or investment in, property, goods, or
12 services, or for the purpose of obtaining information that will or
13 may be used for that purpose, but does not include such
14 communications:

15 a. In response to an express request of the person called;

16 b. Primarily in connection with an existing debt or contract,
17 the payment or performance of which has not been
18 completed at the time of the call;

19 c. To any person with whom the telephone solicitor, or an
20 affiliate or related entity of the telephone solicitor, has a
21 prior or existing business relationship; or

22 d. Made directly by organizations described in section
23 501(c)(3) of the Internal Revenue Code.

24 (3) "Telephone solicitor" means any legal entity doing business in this
25 State that makes or causes to be made telephone solicitations.

26 (b) The Secretary of State shall establish a list of residential telephone subscribers
27 who object to receiving telephone solicitations. Any residential telephone subscriber
28 who desires to be placed on this list may notify the Secretary of State, in writing, and
29 be placed on the list upon receipt by the Secretary of State of a fee of ten dollars
30 (\$10.00) for the initial listing charge. The list shall be renewed annually by the
31 Secretary of State for each subscriber upon receipt of a renewal notice and a renewal
32 fee of five dollars (\$5.00). The Secretary of State shall issue this list of subscribers
33 upon receipt of initial subscriptions and shall update the list at least quarterly. The
34 Secretary of State shall provide the list to telephone solicitors upon request for a fee
35 of ten dollars (\$10.00), in either printed or electronic format as requested by the
36 telephone solicitor. The Secretary of State shall provide consumers who request that
37 their names be placed on the list with information about the Telephone Preference
38 Service offered by the Direct Marketing Association, including the way to participate
39 in the program, and the benefits to be derived from participating.

40 In the event that the Federal Communications Commission establishes a single
41 national database of the telephone numbers of subscribers who object to receiving
42 telephone solicitations pursuant to the provisions of 47 U.S.C. § 227(c)(3), the
43 Secretary of State shall include the portion of that national database covering
44 subscribers in North Carolina within the list established under this section.

1 (c) No telephone solicitor shall make or cause to be made any telephone
2 solicitation to any telephone number on the list published by the Secretary of State
3 pursuant to subsection (b) of this section after the expiration of 90 days from the date
4 that the number is initially included in the list. Any person who offers for sale any
5 consumer information that includes telephone numbers, other than persons providing
6 directory assistance and telephone directories or lists made available through tariffs
7 approved by the North Carolina Utilities Commission, shall screen and exclude the
8 numbers appearing on the current listing published by the Secretary of State pursuant
9 to subsection (b) of this section within 90 days of each publication and shall certify
10 compliance to purchasers of the information.

11 (d) Any telephone solicitor who makes a telephone solicitation to the telephone
12 line of any residential telephone subscriber in this State shall, at the beginning of the
13 call, state clearly the identity of the person or entity initiating the call.

14 (e) No telephone solicitor who makes a telephone solicitation to the telephone
15 line of a residential telephone subscriber in this State shall knowingly use any method
16 to block or otherwise circumvent that subscriber's use of a caller identification
17 service. A telephone solicitor who makes a telephone solicitation to the telephone
18 line of a residential subscriber through the use of a private branch exchange (PBX)
19 that does not transmit caller identification information shall not be in violation of this
20 subsection. No provider of telephone caller identification services shall be held liable
21 for violations of this subsection committed by other persons or entities.

22 (f) The Attorney General shall investigate any complaints received alleging
23 violations of subsections (c) through (e) of this section. If, after investigating a
24 complaint, the Attorney General finds that there has been a violation of subsections
25 (c) through (e) of this section, the Attorney General may bring an action to impose a
26 civil penalty and to seek any other appropriate relief, including equitable relief to
27 restrain the violation. The civil penalty imposed shall not exceed five hundred
28 dollars (\$500.00) per violation. In determining the amount of the civil penalty, or
29 whether it is appropriate to waive the civil penalty for a first violation, the court shall
30 consider all relevant circumstances, including the extent of harm caused by the
31 conduct constituting a violation, whether the defendant can demonstrate that the
32 defendant has established and implemented reasonable practices and procedures and
33 exercised due care to prevent telephone solicitations constituting violations, and
34 whether the defendant has taken any other corrective action.

35 (g) A telephone solicitor complies with this section by participating in the
36 Telephone Preference Service of the Direct Marketing Association and making
37 written certification to the Secretary of State of its participation in that service.
38 However, a telephone solicitor who elects the alternative method of compliance set
39 forth in this subsection shall be deemed to have violated subsections (c) through (e)
40 of this section by taking any of the actions prohibited by those subsections with
41 respect to a residential telephone subscriber whose name has been placed on the list
42 maintained under the Telephone Preference Service of the Direct Marketing
43 Association.

1 (h) It shall be a defense in any action or proceeding brought under subsection (f)
2 of this section that the defendant has established and implemented, with due care,
3 reasonable practices and procedures to effectively prevent telephone solicitations in
4 violation of this section."

5 Section 3. Chapter 62 of the General Statutes is amended by adding a
6 new section to read:

7 "§ 62-53. Notification of opportunity to object to telephone solicitation.

8 The Commission shall require each local exchange company to notify all persons
9 who subscribe to residential service from that company of the opportunity to be
10 placed on the list of persons who object to receiving telephone solicitations
11 established in G.S. 75-30.1. The notification shall be made by the later of March 1,
12 2000, or the time the person initially subscribes to residential service from the local
13 exchange company."

14 Section 4. This act becomes effective October 1, 1999.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 1999

S

1

SENATE BILL 221

Short Title: No Telephone Solicitation.

(Public)

Sponsors: Senator Robinson.

Referred to: Information Technology.

March 4, 1999

- 1 A BILL TO BE ENTITLED
2 AN ACT TO ALLOW RESIDENTIAL TELEPHONE SUBSCRIBERS TO BE
3 PLACED ON A LIST OF PERSONS WHO OBJECT TO TELEPHONE
4 SOLICITATIONS AND TO PROHIBIT TELEPHONE SOLICITORS FROM
5 MAKING CALLS TO PERSONS ON THAT LIST.
6 The General Assembly of North Carolina enacts:
7 Section 1. The General Assembly finds that:
8 (1) The use of the telephone to market goods and services to
9 consumers is increasingly pervasive now due to the availability of
10 cost-effective telemarketing techniques.
11 (2) Thousands of businesses actively telemarket goods and services to
12 residential customers.
13 (3) Telemarketing can be an intrusive and relentless invasion of the
14 privacy and peacefulness of the home.
15 (4) Many citizens of this State are upset at the proliferation of calls to
16 their homes from telemarketers.
17 (5) The rights to privacy and commercial speech can be balanced in a
18 way that accommodates both the privacy of individuals and
19 legitimate telemarketing practices.
20 (6) The public interest requires the establishment of a mechanism
21 under which the citizens of this State can decide whether or not
22 they wish to receive telemarketing calls in their homes.
23 Section 2. Chapter 75 of the General Statutes is amended by adding a
24 new section to read:

1 "§ 75-30.1. Restrictions on telephone solicitations.

2 (a) For purposes of this section:

3 (1) 'Residential telephone subscriber' means a person who subscribes
4 to residential telephone service from a local exchange company or
5 the persons living or residing with that person.

6 (2) 'Telephone solicitation' means a voice communication over a
7 telephone line for the purpose of soliciting or encouraging the
8 purchase or rental of, or investment in, property, goods, or
9 services, or for the purpose of obtaining information that will or
10 may be used for that purpose, but does not include any of the
11 following communications:

12 a. In response to an express request of the person called.

13 b. Primarily in connection with an existing debt or contract,
14 the payment or performance of which has not been
15 completed at the time of the call.

16 c. To any person with whom the telephone solicitor has a prior
17 or existing business relationship.

18 d. By or on behalf of organizations described in section
19 501(c)(3) of the Internal Revenue Code.

20 (3) 'Telephone solicitor' means any legal entity doing business in this
21 State that makes or causes to be made telephone solicitations.

22 (b) The Attorney General shall establish and maintain a list of telephone numbers
23 of residential, mobile, or telephonic paging device telephone subscribers who object
24 to receiving telephone solicitations. Any residential telephone subscriber who
25 desires to be placed on this list may notify the Attorney General and be placed on
26 the list upon receipt by the Attorney General of a fee of ten dollars (\$10.00) for the
27 initial listing charge. The subscriber may renew the subscriber's listing for a year
28 upon receipt of a renewal notice and a renewal fee of five dollars (\$5.00) for each
29 year. The Attorney General shall update the list at least quarterly. The Attorney
30 General shall provide paper or electronic copies of the list to telephone solicitors
31 upon request for a fee of ten dollars (\$10.00) per year. The fees collected under this
32 section shall be credited to the General Fund and appropriated to the Attorney
33 General to support the cost of implementing this section.

34 (c) In the event that the Federal Communications Commission establishes a single
35 national database of the telephone numbers of subscribers who object to receiving
36 telephone solicitations pursuant to the provisions of 47 U.S.C. § 227(c)(3), the
37 Attorney General shall include the portion of that national database covering
38 subscribers in North Carolina within the list established under this section.

39 (d) No telephone solicitor shall make or cause to be made any telephone
40 solicitation to any telephone number that, at the time of the solicitation, appears on
41 the listing published by the Attorney General pursuant to subsection (b) of this
42 section. Any person who offers for sale any consumer information that includes
43 telephone numbers, other than persons providing directory assistance and telephone
44 directories and organizations described in section 501(c)(3) of the Internal Revenue

1 Code, shall screen and exclude the numbers appearing on the current listing
2 published by the Attorney General pursuant to subsection (b) of this section.

3 (e) Any telephone solicitor who makes a telephone solicitation to the telephone
4 line of any residential telephone subscriber in this State shall, at the beginning of the
5 call, state clearly the identity of the person or entity initiating the call. Any
6 telephone solicitor who makes a telephone solicitation to the telephone line of any
7 residential telephone subscriber in this State shall, within 30 seconds after beginning
8 the conversation, inquire whether the person being solicited is interested in listening
9 to a sales presentation and immediately discontinue the solicitation if the person
10 being solicited gives a negative response.

11 (f) No telephone solicitor who makes a telephone solicitation to the telephone line
12 of a residential telephone subscriber in this State shall knowingly use any method to
13 block or otherwise circumvent that subscriber's use of a caller identification service.

14 (g) Information contained in the list published under subsection (b) of this section
15 shall be used only for the purpose of complying with this section or in a proceeding
16 or action under subsection (h) or (i) of this section. The information contained in
17 the list published under subsection (b) of this section is not a public record under
18 Chapter 132 of the General Statutes and shall not be subject to public inspection or
19 disclosure.

20 (h) The Attorney General shall investigate any complaints received alleging
21 violations of any of subsections (c) through (e) of this section. If, after investigating a
22 complaint, the Attorney General finds that there has been a violation of subsections
23 (c) through (e) of this section, the Attorney General may bring an action to impose a
24 civil penalty and to seek any other appropriate relief, including equitable relief to
25 restrain the violation. The civil penalty imposed shall not exceed five thousand
26 dollars (\$5,000) per violation. In determining the amount of the civil penalty, the
27 court shall consider all relevant circumstances, including the extent of harm caused
28 by the conduct constituting a violation, whether the defendant can demonstrate that
29 the defendant has established and implemented reasonable practices and procedures
30 and exercised due care to prevent telephone solicitations constituting violations, and
31 whether the defendant has taken any other corrective action.

32 (i) Any person who has received more than one telephone solicitation within any
33 12-month period by or on behalf of the same person or entity in violation of
34 subsection (d) of this section may either bring an action to enjoin such violation;
35 bring an action to recover for actual monetary loss from such knowing violation or to
36 receive up to two thousand dollars (\$2,000) in damages for each such knowing
37 violation, whichever is greater; or bring both of these actions.

38 (j) It shall be a defense in any action or proceeding brought under subsection (h)
39 or (i) of this section that the defendant has established and implemented, with due
40 care, reasonable practices and procedures to effectively prevent telephone
41 solicitations in violation of this section.

42 (k) The remedies available under this section are not exclusive and are in addition
43 to all other remedies provided by law.

44 (l) The Department of Justice shall adopt rules that:

- 1 (1) Require each local exchange company to inform its residential
2 telephone subscribers of the opportunity to provide notification to
3 the Attorney General that the subscriber objects to receiving
4 telephone solicitations.
- 5 (2) Specify the methods by which each residential telephone
6 subscriber may give notice to the Attorney General of the
7 subscriber's objection to receiving telephone solicitations or
8 revocation of that notice.
- 9 (3) Specify the length of time for which a notice of objection shall be
10 effective and the effect of a change of telephone number on that
11 notice.
- 12 (4) Specify the methods by which such objections and revocations
13 shall be collected and added to the list under subsection (b) of this
14 section.
- 15 (5) Specify the methods by which any person or entity desiring to
16 make telephone solicitations will obtain access to the list under
17 subsection (b) of this section as required to avoid calling the
18 telephone numbers of residential telephone subscribers included in
19 the list under subsection (b) of this section.
- 20 (6) Are necessary or desirable to implement this section."

21 Section 3. Chapter 62 of the General Statutes is amended by adding a
22 new section to read:

23 "§ 62-53. Notification of opportunity to object to telephone solicitation.

24 The Commission shall by rule require each local exchange company to periodically
25 notify all persons who subscribe to residential service from that company of the
26 opportunity to be placed on the list of persons who object to receiving telephone
27 solicitations established in G.S. 75-30.1. This notification shall include at a minimum
28 annual inserts in the billing statements mailed to customers."

29 Section 4. This act becomes effective October 1, 1999.

APPENDIX B

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 1999

S/H

D

99-LL-169D(3.15)

(THIS IS A DRAFT AND IS NOT READY FOR INTRODUCTION)

Short Title: Controlling Telephone Solicitations. (Public)

Sponsors: .

Referred to:

1 A BILL TO BE ENTITLED
2 AN ACT TO PROVIDE CONSUMERS WITH CONTROL OVER TELEPHONE
3 SOLICITATION CALLS TO THEIR HOMES.
4 The General Assembly of North Carolina enacts:
5 Section 1. The General Assembly finds that:
6 (1) The use of the telephone to market goods and
7 services to consumers is increasing;
8 (2) Some citizens of this State wish to have a means of
9 controlling these calls to their residences;
10 (3) The rights to privacy and commercial speech can be
11 balanced in a way that accommodates both the
12 privacy of individuals and legitimate telemarketing
13 practices; and
14 (4) The public interest requires the establishment of a
15 mechanism under which the citizens of this State
16 can decide whether or not they wish to receive
17 telemarketing calls in their homes.
18 Section 2. Chapter 75 of the General Statutes is
19 amended by adding a new section to read:
20 "§ 75-30.1. Restrictions on telephone solicitations.
21 (a) For purposes of this section:
22 (1) "Residential telephone subscriber" means a person
23 who subscribes to residential telephone service
24 from a local exchange company and uses that service

- 1 primarily for residential purposes, or the persons
2 living or residing with that person.
- 3 (2) "Telephone solicitation" means a voice
4 communication over a telephone line to a
5 residential telephone subscriber for the purpose of
6 soliciting or encouraging the purchase or rental
7 of, or investment in, property, goods, or services,
8 or for the purpose of obtaining information that
9 will or may be used for that purpose, but does not
10 include such communications:
- 11 a. To any person with that person's prior express
12 invitation or permission;
- 13 b. To any person with whom the telephone
14 solicitor has an established, continuing
15 business relationship; or
- 16 c. By or on behalf of a tax-exempt nonprofit
17 organization.
- 18 (3) "Telephone solicitor" means any business or other
19 legal entity doing business in this State that
20 makes telephone solicitations or causes telephone
21 solicitations to be made.
- 22 (b) Any telephone solicitor who makes a telephone solicitation
23 to a residential telephone subscriber shall:
- 24 (1) At the beginning of the call, state clearly the
25 identity of the business, individual, or other
26 legal entity initiating the call, and identify the
27 person making the call by that person's legal name;
- 28 (2) During the call, state clearly the telephone
29 number, other than that of the automatic dialer or
30 prerecorded message machine player that placed the
31 call, or the address of the business, individual,
32 or other legal entity initiating the call;
- 33 (3) Inquire at the beginning of the call whether the
34 person called consents to the solicitation, and
35 terminate the call if the person does not consent;
36 and
- 37 (4) If the person called requests to be taken off the
38 contact list of the telephone solicitor, take all
39 steps necessary to remove that person's name and
40 telephone number from the contact records of the
41 business, individual, or other legal entity
42 initiating the call.
- 43 (c) Every telephone solicitor who makes telephone
44 solicitations in this State shall implement in-house systems and

1 procedures designed to prevent further calls to persons who have
2 asked not to be called again. Compliance with Section 64.1200(e)
3 of the Federal Communications Commission's Restrictions on
4 Telephone Solicitation constitutes compliance with this section.

5 (d) No telephone solicitor shall initiate a call to a
6 residential telephone subscriber who has communicated to that
7 telephone solicitor a desire to be taken off the contact list of
8 that solicitor.

9 (e) No telephone solicitor shall initiate a call to a
10 residential telephone subscriber after nine o'clock p.m. or
11 before eight o'clock a.m. at the called party's location.

12 (f) No telephone solicitor who makes a telephone solicitation
13 to the telephone line of a residential telephone subscriber in
14 this State shall knowingly use any method to block or otherwise
15 circumvent that subscriber's use of a caller identification
16 service. A telephone solicitor who makes a telephone
17 solicitation to the telephone line of a residential subscriber
18 through the use of a private branch exchange (PBX) or other call-
19 generating system that does not transmit caller identification
20 information shall not be in violation of this subsection. No
21 provider of telephone caller identification services shall be
22 held liable for violations of this subsection committed by other
23 persons or entities.

24 (g) The Attorney General may investigate any complaints
25 received alleging violations of subsections (b) through (f) of
26 this section. If, after investigating a complaint, the Attorney
27 General finds that there has been a violation of subsections (b)
28 through (f) of this section, the Attorney General may bring an
29 action to impose a civil penalty and to seek any other
30 appropriate relief, including equitable relief to restrain the
31 violation pursuant to G.S. 75-14. Actions for civil penalties
32 under this section shall be consistent with the provisions of
33 G.S. 75-15.2, except that the penalty imposed for a violation of
34 this section shall not exceed five hundred dollars (\$500) per
35 violation.

36 (h) A person who has received more than one telephone
37 solicitation within any twelve-month period by or on behalf of
38 the same telephone solicitor in violation of subsections (b)
39 through (f) of this section may bring either or both of the
40 following actions in the General Court of Justice:

- 41 (1) An action to enjoin further violations.
- 42 (2) An action to recover for actual monetary losses
43 resulting from each violation or up to five hundred

1 dollars (\$500) in damages for each violation,
2 whichever is greater.

3 In an action brought pursuant to this section, a prevailing
4 plaintiff shall be entitled to recover reasonable attorney fees
5 and the court may award reasonable attorney fees to a prevailing
6 defendant if the court finds that the plaintiff knew, or should
7 have known, that the action was frivolous and malicious.

8 (i) A citizen of this State is also entitled to bring an
9 action in the General Court of Justice to enforce the private
10 rights of action established by federal law under 47 U.S.C.
11 §227(b)(3) and 47 U.S.C. §227(c)(5).

12 (j) Actions brought pursuant to subsections (h) and (i) of
13 this section shall be tried in the county where the plaintiff
14 resides at the time of the commencement of the action."

15 Section 3. Chapter 62 of the General Statutes is
16 amended by adding a new section to read:

17 "§ 62-53. Notification of opportunity to object to telephone
18 solicitation.

19 The Commission shall require each local exchange company to
20 notify all persons who subscribe to residential service from that
21 company of the provisions of G.S. 75-30.1, of the federal laws
22 allowing consumers to object to receiving telephone
23 solicitations, and of programs made available by private industry
24 that allow consumers to have their names removed from
25 telemarketing lists, by enclosing that information, at least
26 annually, in every telephone bill mailed to residential
27 customers. The Commission shall also ensure that this
28 information is printed in a clear, conspicuous manner in the
29 consumer information pages of each telephone directory
30 distributed to residential customers."

31 Section 4. This act becomes effective October 1, 2000,
32 and applies to telephone calls made on or after that date.
33 Section 3 applies to all telephone directories printed on or
34 after that date.

BILL ANALYSIS:

Telephone Solicitors to Remove Residential Telephone Subscribers from their Contact List.

This bill mirrors the federal law regarding telephone solicitation and would require each telephone solicitor doing business in this State to remove residential telephone subscribers from their contact list when the residential subscriber requests to be removed from the contact list. The NC Utilities Commission must require local carriers to notify their residential subscribers of the provisions in this bill, of the federal laws pertaining to telephone solicitation, and of the private industry programs of the same nature (e.g. Direct Marketing Association). The NC Utilities Commission must require that notification must be placed at least once a year in the telephone bills of residential telephone subscribers and conspicuously published in telephone books.

Telephone solicitation does NOT include: calls made with the permission of the person called; calls made to persons with whom the solicitor has an established, continuing business relationship; and calls made by or on behalf of tax-exempt nonprofit organizations.

Solicitors Prohibited from Soliciting those Requesting to be Removed from their Contact List.

Solicitors doing business in NC are prohibited from calling any telephone number where the residential telephone subscriber requests to be removed from the solicitor's contact list. Additionally, this bill requires solicitors to:

- Identify the business, individual or entity initiating the call and the person making the call (identify themselves by their legal name);
- State the telephone number of the entity initiating the call;
- Ask the person called if they consent to the solicitation;
- Establish procedures to prevent further calls to persons who request not to be called again;
- Restrict their calls to the hours between 8:00 a.m. and 9:00 p.m.; and
- Not block the telephone subscribers' caller ID.

Enforcement.

Attorney General.

This bill authorizes the Attorney General to investigate solicitors who violate the provisions described in the above section. The Attorney General may impose a civil penalty of not more than \$500 for each violation and may seek equitable relief to restrain further violations. In determining the amount of the civil penalty or whether to waive the penalty for the first violation, the court must consider all relevant circumstances, including:

- Extent of the harm caused;
- Nature and persistence of conduct;
- Length of time over which conduct occurred;
- The assets, liabilities, and net worth of the entity; and
- Any corrective action taken by the telephone solicitor.

State Private Right of Action.

This bill also grants persons receiving more than one solicitation within a twelve-month period from the same solicitor in violation of this bill the right to enjoin the solicitor and sue for

at least \$500 in damages. Prevailing plaintiffs are entitled to attorney fees. Conversely, prevailing defendants may be awarded attorney fees if the court finds that the plaintiff knew or should have known that the action was frivolous and malicious.

Federal Private Right of Action.

Citizens may also initiate an action in State court to enforce the provisions of federal law regarding telephone solicitation. This provision is included in the bill because it has come to the staff's attention that the private right of action under federal law contains conditional language that entitles a person to relief under the federal law only "if otherwise permitted by the laws or rules of court of a State..." 42 U.S.C. § 227(b)(3) and (c)(5). Reportedly, some actions have been disallowed due to the lack of a NC State law that specifically permits these types of actions. Venue under both the State and federal private right of action is in the county where the plaintiff resides.

Effective Date.

This act becomes effective October 1, 2000. This act applies to all telephone directories published and all telephone calls made on or after October 1, 2000.

Constitutional Considerations.

This legislation appears to be a constitutionally-permissible method of balancing the first amendment free speech rights of telephone solicitors engaging in commercial speech with the governmental interest of protecting citizens' privacy within their own homes. In addition, this bill tackles the problem of the State's jurisdiction over interstate calls. The federal law covers interstate calls (calls originating outside NC) and clearly any NC law would cover intrastate calls. This bill is substantially similar to the federal law and thus creates uniform coverage over all telephone solicitations in NC – both inter and intrastate telephone solicitations.

APPENDIX C

Current Means of Restricting Telephone Solicitation

There are currently two courses of action available to consumers who are attempting to prevent telephone solicitors from calling their homes. The first of these is two federal laws and the regulations established for their enforcement by the Federal Communications Commission and the Federal Trade Commission. The second is a voluntary program established by the Direct Marketing Association on behalf of its members.

Federal Law

The federal Telephone Consumer Protection Act, 47 United States Code §227, and the regulations accompanying it require telemarketers to maintain a list of persons who have indicated that they do not wish to receive telephone solicitations from or on behalf of that company - in other words, each company must keep its own "do not call" list. The law also requires each telemarketer to have in place a written policy for maintaining that list and to train its personnel in the use of that list. Therefore, a consumer receiving a telephone solicitation can ask at the time of the call to be placed on a company's do not call list, and the company is required to honor that request for ten years from the time the request is made.

Enforcement of this first federal law is found in the regulations of the FCC, which provides a consumer with a private right of action against a telemarketer if that consumer receives more than one telephone call within a twelve-month period from a solicitor in violation of the consumer's request not to be called. This private action must be brought in state small claims court and is limited to a recovery of \$500.

The Telemarketing and Consumer Fraud and Abuse Prevention Act, 15 United States Code §6101, and the regulations accompanying it also require all telemarketers to maintain "do not call" lists. These separate regulations provide for enforcement by the FTC or by the state

Attorney General, presumably even after a single call in violation of a consumer's request not to be called.

Under both of these acts, however, a telemarketer is entitled to make an affirmative defense that relieves it from liability if (1) it has established and implemented written procedures to comply with the do not call requirements; (2) it has trained its personnel in the procedures; (3) it has maintained and recorded lists of persons asking not to be called; and (4) any subsequent call was in error.

DMA's Telephone Preference Service

The Direct Marketing Association has established a program known as the Telephone Preference Service. A person may register for this service free of charge by sending the person's name, home address, and home telephone number and signature in a letter or on a postcard to the DMA. The service is available only by mail, because a signed request delivered by the Postal Service provides the DMA with a practical means of verifying that the person who submits the request is the person whose name is to be removed from marketing lists. Of course, this is a purely voluntary service and requires self-enforcement by the telemarketing industry.

APPENDIX D

Membership of the Telephone Solicitation Committee

Pro Tem's Appointments

Sen. David Weinstein, Cochair
Sen. Austin Allran
Sen. Charles N. Carter, Jr.
Sen. Linda Garrou
Sen. Jeanne Lucas
Sen. Dan Robinson
Mr. Robert Warren

Speaker's Appointments

Rep. Gordon Allen, Cochair
Rep. Pryor Gibson
Rep. Jim Gulley
Rep. Edith Warren
Rep. Jennifer Weiss
Rep. Eugene Wilson